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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of
Implementation of Section 309(j)
of the Communications Act
Competitive Bidding

PP Docket No. 93-253

REPLY COMMENTS OF CABLE & WIRELESS, INC.

Cable & Wireless, Inc., (CWI) submits these reply comments with regard to the Commission's consideration of requests for rule waivers in connection with license applications that are subject to competitive bidding. The least disruptive and most equitable procedure for dealing with waiver requests that establish an applicant's threshold eligibility for licensing is for the Commission to issue a determination prior to auction. This injects a greater element of certainty into the auction process, permits applicants seeking waivers to more easily obtain financing and form partnerships, and promotes administrative efficiency by reducing the likelihood of a repeat auction. The Commission should also encourage applicants to pursue waiver requests prior to the application filing window whenever possible. In this vein, CWI anticipates submitting a request for relief pursuant to §310(b)(4), regarding foreign ownership issues, prior to its filing an application subject to the competitive bidding process.

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In the Notice of Proposed Rulemaking,¹ the Commission asks for comment on the procedures it should adopt for applicants seeking rule waivers where a license is to be auctioned.² The Commission notes that where a waiver request is denied prior to auction the applicant would be barred from participation.³

Although cast in a procedural mode, resolution of this issue will have a direct substantive impact on CWI's opportunities for meaningful participation in Personal Communications Services (PCS), perhaps the single most fundamental development in the voice telecommunications marketplace of our time. In light of CWI's indirect foreign ownership,⁴ grant of a radio license to provide common carrier services may be denied to it "if the Commission finds that the public interest will be served by the refusal ... of such license."⁵ As such, notwithstanding CWI's

¹ Implementation of Section 309(j) of the Communications Act Competitive Bidding, PP Docket No. 93-253, FCC No. 93-455 (released October 12, 1993) (NPRM).

² Id. at para. 99.

³ Id.

⁴ CWI is a District of Columbia corporation and a wholly-owned subsidiary of Cable & Wireless North America, Inc., (CWNA) a Virginia corporation. CWNA is in turn a wholly-owned subsidiary of Cable and Wireless plc, a publicly traded company incorporated and headquartered in the United Kingdom.

⁵ The full text of Section 310(b)(4) provides that:

(b) No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by

....

(4) any corporation directly or indirectly controlled by any
(continued...)

technical expertise, innovative marketing concepts, financial wherewithal, and entrepreneurial initiative, and the benefits which would flow to the public from CWI offering PCS service, the Commission may nonetheless deny grant and award a license to an otherwise less qualified applicant.⁶

As a practical matter, the Commission has placed on applicants the burden of persuasion as to why, in a particular instance, grant of a radio license is merited where there is an indirect foreign ownership interest in excess of the §310(b)(4) benchmark.⁷ Although the process is not, per se, a request for waiver, the Commission has adopted a case-by-case analysis which turns on the individual merits of each application. In each instance in which CWI would apply for a common carrier radio license subject to competitive bidding, therefore, the Commission will be required to address issues raised by §310(b)(4) absent a

⁵(...continued)

other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

⁶ Reciprocally, if the Commission is unable to conclude that public interest factors require denial or revocation of a license, or fails to do so, the plain meaning of §310(b)(4) would require grant regardless of the degree of indirect foreign ownership or control.

⁷ See e.g., COMSAT Earth Stations, Inc., CSG-93-112-AL, DA 93-1275 (released October 26, 1993); Teleport Transmission Holdings, Inc., 8 FCC Rcd 3063 (1993); GRC Cablevision, Inc. 47 F.C.C. 2d 467, 30 R.R. 2d. 827 (1974).

general policy statement with regard to the foreign ownership issue as it applies to CWI. The process will, then, look much like the procedures for consideration of waivers of the Commission's qualification or eligibility rules.

In this regard, CWI agrees with the comments of the Utilities Telecommunications Council⁸ that the Commission should process eligibility waiver requests, including determinations pursuant to §310(b)(4), prior to auction. This timing element is important for a number of reasons.

First, applicants will be more favorably positioned to obtain financing terms and to form alliances and partnerships.⁹ Lingering questions of threshold eligibility will dampen interest from a broad range of capital sources, and obviously compromise applicants' ability to enter commercial agreements with prospective partners. By delaying consideration until after auction, the Commission introduces regulatory risk for foreign carriers by extending the period of uncertainty as to the threshold eligibility of an applicant in a process already fraught with uncertainty. The additional measure of ambiguity would create a strong disincentive among potential partners and capital sources -- who already enjoy enormous choice among potential applicants -- from allying with CWI.

⁸ Comments of the Utilities Telecommunications Council (UTC) at 19-20.

⁹ Although an applicant must certify to financial qualifications at the time of application, it may seek final financing from a variety of sources at the best terms possible.

Without a prior grant of eligibility, a successful applicant is subject not only to the usual perils of litigating petitions to deny, but also to the added burden of the waiver request. Additionally, funding concerns are fueled by the Commission's proposal to require forfeiture of the substantial upfront deposit when a successful application is dismissed after auction. This second element of regulatory risk could further increase applicants' cost of capital and decrease the scope of equity and financing choices.¹⁰

In sum, the FCC proposed procedures create regulatory uncertainty in the business planning process and therefore reduces the practical ability of foreign firms to participate in the PCS market.

Second, it promotes administrative efficiency by eliminating the possibility that the Commission will be forced to invalidate an auction on the basis of §310(b)(4). If the Commission denies a waiver request associated with an otherwise successful application, it would be required to dismiss the underlying application. The Commission has proposed that the most equitable resolution in that case would be to then conduct a second auction among the remaining applicants.¹¹ This would generate considerable

¹⁰ If the Commission ultimately determines that it will rule on waiver requests after auction, rather than before, it should, at a bare minimum, refrain from imposing forfeiture of deposit where an applicant has pursued 310(b)(4) relief in good faith and the public interest determination is not forthcoming.

¹¹ NPRM at para 113. Accord Paging Network, Inc. at 37; TRW, Inc. at 31; UTC at 21; AT&T at 41-42.

expense and delay, would strain limited resources, and could disrupt the conduct of auctions for other licenses. Moreover, as UTC notes,¹² in the second round of bidding participants would possess knowledge of their opponents' bids in the earlier round.

Third, ruling on waiver requests prior to bidding would, in all likelihood, consume fewer resources than conducting a second auction, particularly if the remaining applicants do not retain cut-off rights and a further round of applicants become eligible to participate.¹³ There is also merit in UTC's proposal that the Commission consider only waivers establishing threshold eligibility prior to auction, and consider technical and operational waivers after auction.¹⁴

Fourth, an initial §310(b)(4) determination would establish precedent applicable to subsequent application rounds, thereby reducing the need for de novo review with each filing. To the extent practicable, applicants anticipating the need for rule waivers should therefore seek relief prior to the application filing window.¹⁵

For these reasons, CWI anticipates requesting a determination, prior to filing an application in a specific proceeding, that the public interest requires grant of common

¹² UTC at 19.

¹³ See, e.g., UTC at 21.

¹⁴ UTC at 19-20.

¹⁵ Accord, Pacific Bell and Nevada Bell at 25.

carrier radio licenses pursuant to §310(b)(4) to entities indirectly owned or controlled by United Kingdom corporations in excess of the 25% benchmark and up to 100% U.K. ownership. Such a determination will recognize that the United Kingdom affords national treatment to United States corporations,¹⁶ and has in fact, granted a PCS license to a U.S. corporation.¹⁷ Reciprocal opportunities in the U.S. for corporations owned indirectly by United Kingdom corporations would further promote opportunities abroad for U.S. entities and would recognize the open entry policy established under U.K. law.

The determination would also recognize that there is no restriction under U.K. law comparable to §310(b), and the Department of Trade and Industry does not consider the applicant's nationality in ruling on the merits of an application. The selection process focuses instead on the technical and other germane elements of the application. This provides substantial new business opportunities to U.S. operators licensed or soon to be licensed in the U.K., such as MFS and Sprint, who would, as a result, enjoy far greater capacity to

¹⁶ Unlike the U.S., the United Kingdom permits direct investment in radio licenses by U.S. nationals. Section 310(b)(3), on the other hand, precludes such direct investments and does not create a "waiver" mechanism.

¹⁷ An affiliate of US West is a 50% partner in Mercury Personal Communications, which recently launched the Mercury One-2-One personal communications network. Moreover, BellSouth owns a substantial stake in Air Call, the third largest cellular/paging company in the U.K., and other U.S.-owned communications enterprises abound.

merge fixed and wireless services into a seamless offering than do U.K.-owned carriers operating in the U.S. As these wireless markets develop, the 310(b) limitation will increasingly inhibit the globalization of telecommunications services within the U.S. and could easily lead to restrictions on or closing of markets abroad. In the end, it will be the U.S. consumer and entrepreneur who suffers.

* * *

In conclusion, the Commission should address requests for waiver of Commission eligibility rules and for determinations under Section 310(b)(4) prior to auction rather than after.

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